

REPORT No. 16/10
PETITION 11.796
FRIENDLY SETTLEMENT
MARIO GOMEZ YARDEZ
ARGENTINA
March 16, 2010

I. SUMMARY

1. On August 14, 1997, the Inter-American Commission on Human Rights (hereinafter “the Commission” or “the IACHR”) received a petition lodged by Diego Lavado and Carlos Varela Álvarez (hereinafter “the petitioners”), in which they alleged the violation by the Argentina (hereinafter “the State” or “Argentina”) of Articles 8.1 and 25 of the American Convention on Human Rights (hereinafter “the Convention” or “the American Convention”), in conjunction with Article 1.1 thereof, with respect to Mr. Mario Humberto Gómez Yardez (hereinafter “the alleged victim”).

2. The petitioners stated that on 1990 the alleged victim suffered arbitrary detention and torture by police officers in the course of an investigation for aggravated robbery, aggravated rape, and attempted homicide. They also sustained that Argentina was responsible of the violations to a fair trial and due process suffered by the alleged victim on 1990 during his prosecution by the Mendoza provincial judiciary. The petitioners further contended that the competent authorities had allowed a lengthy amount of time since the commission of the crimes without handing down judgment, as a result of which the accused police officers benefited from the application of statutory limitations.

3. This friendly settlement report, in accordance with Article 49 of the Convention and Article 41 (5) of the Commission’s Rules of Procedure, provides a summary of the facts alleged by the petitioners and transcribes the friendly settlement agreement signed on December 5, 2006, by Argentina, represented by Jorge Cardozo, Advisor to the Ministry of Foreign Affairs, International Trade, and Worship, and Mrs. Andrea Gualde, National Director for International Affairs at the National Human Rights Secretariat; by Gustavo Castañera de Dios, Under Secretary of Justice of the Government of Mendoza; and by the petitioner, Dr. Carlos Varela Álvarez. The friendly settlement agreement was approved on May 30, 2007 by the Ministry of Interior, Mendoza Provincial Decree No. 1.107/2007 on May 24, 2007, and ratified by Law No. 7.710 on May 30, 2007. The agreement signed between the parties is also approved, as is the publication of this report.

II. PROCESSING BY THE COMMISSION

4. On October 10, 2000, the IACHR approved Admissibility Report No. 91/00, in which the petition was declared admissible regarding the alleged violations of Articles 8.1 and 25 of the American Convention, in conjunction with Article 1.1 thereof. The Commission also stated that it would consider, during the merits phase, the possible application of Articles 5 and 7. That report was sent to the parties in a communication dated October 24, 2000, in which the IACHR placed itself at the disposal of the parties to reach a friendly settlement of the matter, in accordance with Article 48(1)(f) of the American Convention and Article 40 of its Rules of Procedure. In a communication on November 27, 2000, the petitioners expressed the IACHR that they were willing to embark on friendly settlement proceedings.

5. The Commission received further communications from the petitioners on the following dates: November 27, 2000; March 2 and 15, 2001; July 5, 10, and 16, 2001; August 10 and 16, 2001; September 4 and 13, 2001; November 15, 2001; March 12, 2002; May 7, 2002; August 8, 2002; August 31, 2004; September 20, 2004; and May 3, 2007; all of which were duly forwarded to the State.

6. On the other hand, the IACHR received comments from the State on the following dates: December 15, 2000; April 12 and 18, 2001; October 24, 2001; November 14 and 15, 2001; March 22, 2002; April 4, 2002; July 17, 2002; September 7 and 28, 2004; and December 15, 2004; all of which were duly forwarded to the petitioners.

7. On November 15, 2001, a working meeting between the parties was held at OAS headquarters. In addition, the Commission called on both parties to hold working meetings on the following dates during its periods of sessions: October 26, 2004; December 3, 2004; October 19, 2005; and December 5, 2006.

8. On December 5, 2006, the IACHR received a copy of the friendly settlement agreement signed on December 5, 2006 on one hand, by the petitioner, Dr. Carlos Varela Álvarez; and, on the other, by the Government of the Argentine Republic, represented by Dr. Jorge Cardozo, Cabinet Advisor to the Ministry of Foreign Affairs, International Trade, and Worship, and Dr. Andrea Gualde, National Director for International Affairs at the National Human Rights Secretariat, and by the Government of the Province of Mendoza, represented by Dr. Gustavo Castiñeria de Dios, Under Secretary of Justice. The agreement was approved on May 24, 2007 by the Ministry of Interior of Mendoza by Decree No. 1.107/2007, and ratified on May 30, 2007 by Law No. 7.710.

III. FACTS

9. The petitioners stated that on July 27, 1990, the alleged victim was arrested and his home searched by officers of the Mendoza Provincial Police as part of an investigation for the crimes of aggravated robbery, aggravated rape, and attempted homicide. Both the detention and the search were purportedly unlawful, because according to them there was no court order authorizing them. The alleged victim was initially detained by the highway patrol and then taken by the investigations department of the provincial police department and then he was taken to the Eighth Examining Court, which had shortly before assumed jurisdiction over his arrest. Finally, the alleged victim was transferred to Lavalle Police Precinct No. 17. Furthermore, the petitioners also sustained that while Mr. Gómez Yardez was held in police custody, he was brutally tortured during ten days.

10. According to the petitioners, the decision of the third examining Prosecutor of the First Judicial District, dated April 16, 1996, indicates that the alleged victim suffered various forms of torture, including mock execution, kicking, "waterboarding" and electric shocks to various parts of his body. They added that in such condition, the alleged victim was examined by Dr. Armando Esponda, whom he asked, fruitlessly, to provide medication and analgesics.

11. The petitioners also claimed that when the alleged victim was again brought before the judge, he was found to have lesions of varying levels of severity. As a result of these, he was admitted to Lagomaggiore Hospital and a biopsy was conducted on his scrotum to determine whether electric shocks had been applied. According to the petitioners, the biopsy was lost in one of the State's offices, as would also later happen with the guard book and incident log from the Lavalle police station.

12. The petitioners stated that on September 6, 1990, the alleged victim filed a complaint for torture, just a few weeks after it had taken place. The Eighth Examining Court began criminal proceedings against Deputy Police Chief Enrique Funes on charges of unlawful duress. Later, on December 21, 1992, the judge amended the charge to that of torture and added the names of nine police officers to the inquiry. The defendants' counsel filed a motion for dismissal with the Fourth Criminal Chamber, which revoked the court order that had altered and expanded the charges and ordered that the case be referred back to the First Examining Court of the First Judicial District. When the judge handling the case recused herself, the case was passed to the Second Examining Court.

13. In addition, the petitioners indicated that on November 7, 1994, the Second Examining Court handed down an indictment against nineteen police officers for the crimes of torture, primary and secondary participation in the commission of torture, unlawful duress, or failure to report torture.

14. On August 26, 1995, the Second Examining Court dismissed the case against the eleven defendants charged with failing to report torture, finding that statutory limitations now applied to the incident. On September 11, 1995 the petitioners filed a motion for annulment of such decision, for failure to establish sufficient grounds. On September 21, 1995 the judge responsible for the Second Examining

Court dismissed the motion. On November 23, the petitioners appealed to the Fourth Criminal Chamber, which rejected their motion on November 23, 1995. The petitioners filed an extraordinary appeal before the Mendoza Supreme Court of Justice, which was denied on February 5, 1997.

15. Citing "lack of evidence," on September 21, 1998 the Fourth Criminal Chamber handed down an acquittal of the officers charged with torture. The Chamber's prosecutor requested the defendants' acquittal in his pleading, thereby contradicting what the Third Examining Prosecutor had stated in his opinion of April 16, 1996. The criminal proceedings lasted approximately eight years and one month from the date on which the alleged victim filed a complaint with the competent authorities alleging that he had been tortured.

16. The grounds for the acquittal given the Fourth Criminal Chamber read as follows:

In the instant case, more than seven years passed between the preliminary inquiry and the start of oral arguments, something unprecedented in this Court. That alone defeats any chance of arriving at absolute conclusions from the oral arguments phase of a trial [...] [Compounding the excessive delay in the preliminary proceedings] unmistakable evidence of a number of errors, irregularities and procedural violations has obstructed due process and the quest for the real truth. [Moreover] essential evidence introduced, such as the identifications at Fs. 137/139, has also had to be thrown out [...] owing to a flagrant violation of the laws that guarantee individual rights. In a number of identifications made during the examining phase, there were irregularities that, while not causing nullification, showed that the conditions under which the identifications were made undermined their credibility [for example, the identification rounds or line-ups]. [...] The loss of probative material is but another factor conspiring against any chance of normal trial proceedings [...].

17. The petitioners stated that the alleged victim was held in the Provincial Penitentiary for 13 months, before the First Examining Magistrate ordered that the case alleging his involvement in the criminal acts with which he had been charged be dismissed for lack of evidence.

18. The petitioners contended that the alleged victim suffered violations of the rights protected by Articles 8.1, 24, and 25 of the Convention, in conjunction with the obligation of respecting those rights set out in Article 1.1 thereof.

IV. FRIENDLY SETTLEMENT

19. On September 18, 2000, the petitioner reported that Mr. Mario Humberto Gómez Yardez had died on July 10, 2000. Nevertheless, Gloria Álvarez, the alleged victim's widow, authorized the petitioner to continue representing her and their daughter in the international proceedings.

20. On December 5, 2006, the petitioner, Dr. Carlos Varela Álvarez; the Government of the Argentine Republic, represented by Dr. Jorge Cardozo, Cabinet Advisor to the Ministry of Foreign Affairs, International Trade, and Worship, and Dr. Andrea Gualde, National Director for International Affairs at the National Human Rights Secretariat; and the Government of the Province of Mendoza, represented by Dr. Gustavo Castiñeria de Dios, Under Secretary for Justice, signed an agreement to the following effect:

At the seat of the Ministry of Foreign Affairs, International Trade, and Worship, on December 5, 2006, in Case No. 11.796, "Mario H. Gómez Yardez," before the Inter-American Commission on Human Rights, the following parties met: the petitioner, Mr. Carlos Varela Álvarez; the Inter-American Commission on Human Rights, represented by Commissioner Florentín Meléndez; the Government of the Argentine Republic, represented by Mr. Jorge Cardozo, Cabinet Advisor to the Ministry of Foreign Affairs, International Trade, and Worship, and Ms. Andrea Gualde, National Director for International Affairs at the National Human Rights Secretariat; and the Government of the Province of Mendoza, represented by Mr. Gustavo Castiñeria de Dios, Under Secretary of Justice.

Having finished their discussions, the parties state that:

1. The petitioner and the Government of the Province of Mendoza agree to sign a friendly settlement agreement containing the State's acknowledgement of its responsibility in this matter and the establishment of an Ad Hoc Arbitration Tribunal to determine reparations, measures of non-repetition, and compensation.

2. The petitioner and the Government of the Province of Mendoza agree to convey the aforesaid Agreement to the Ministry of Foreign Affairs, International Trade, and Worship, within a period of no more than five business days, with the composition and regulations of the Arbitration Tribunal, for it to be forwarded to the Inter-American Commission on Human Rights for its approval.

3. The Government of the Province of Mendoza reserves the right to refer the Agreement as approved by the Inter-American Commission on Human Rights to the Provincial Legislature for its assent.

Comments:

The signatories understand that the participation of the Government of the Argentine Republic in this act is limited to the drafting of a preparatory agreement, intended to build the consensus necessary to reach a friendly settlement of the case.

The points regarding which it is hereby agreed to continue working cannot and must not be interpreted as the final will of the Republic of Argentina, which will only be involved in the final friendly settlement agreement, which will be signed for that purpose by the competent authority and duly enacted by the National Executive.

The statements by the petitioners that may be set out in this document must be understood on an individual basis, and no agreement and/or acquiescence with respect to them by the Argentine State may be inferred.

21. On March 2, 2007, the Ad Hoc Arbitration Tribunal, comprising Susana Albanese, Aída Kemelmajer de Carlucci, and José L. Sabatini, decided to set the amount of 110,000 pesos as compensation for the facts of the case.

22. On May 24, 2007, the Government of the Province of Mendoza published Decree 1107, containing the friendly settlement agreement between the parties and establishing the following:

Decree 1107 of 2007

Having seen case No. 11.796 of the Inter-American Commission on Human Rights, titled "Mario Gómez Yardez v. Argentina," and case file No. 932-S-2007-00100 from the Interior Ministry, titled Under Secretariat of Justice, REF/Case No. 11796, YARDEZ MARIO GOMEZ; and

WHEREAS:

That by a deed signed on December 5, 2006, the Provincial Government undertook to enter into a friendly settlement agreement setting out the State's acknowledgement of its responsibility in this matter and the establishment of an Ad Hoc Arbitration Tribunal to identify reparations, measures of non-repetition, and compensation;

That said deed was signed at the suggestion of the nation's Ministry of Foreign Affairs, International Trade, and Worship;

That the Inter-American Commission on Human Rights and the Inter-American Court of Human Rights are competent to hear cases of alleged violations of human rights, pursuant to Law 23.054 whereby the American Convention on Human Rights was ratified in 1984;

That in 1994 the Convention was incorporated into Article 75.22 of the National Constitution;

That the convictions for human rights violations at the provincial level which the Inter-American Court of Human Rights of the Organization of American States has previously imposed on the

country have negatively affected the patrimony, image, and international credibility of the Province of Mendoza and the Republic of Argentina;

That these kinds of cases are of particular relevance by reason of their nature and the scope of their resolution, because these cases involve public international law regarding human rights, and it is vital that the Province assume that fact in its full dimension;

That Article 48.f of the American Convention on Human Rights offers the possibility of reaching a friendly settlement agreement whereby Argentina's international conviction could be avoided;

That the administrative procedure stipulated by the deeds of December 21, 2006, and January 30, 2007, has been pursued;

That there are opinions from the Advisory Commission at pp. 36/42, from the Legal Department of the Interior Ministry at pp. 48/50, and from the Attorney of the State at pp. 51/52 indicating the advisability of accepting the ruling of the Advisory Commission and of proceeding with payment of the proposed amounts of money, although said payment must be approved by the Legislature as stipulated by Article 99.4 of the Constitution of Mendoza;

That it is necessary to give legal entity to the representation of the Province and also to the effects of the opinion of the Advisory Commission;

That it is in the interests of the Province's revenue to establish a form of extrajudicial transaction as suggested; and

That promoting and defending human rights at the provincial level is a fundamental and inalienable function of the State.

Consequently,

**The
GOVERNOR OF THE PROVINCE**

DECREES:

Article 1: Approve the resolutions of the Advisory Commission appointed under the Deed in pursuit of friendly settlement in case No. 11796 of the Inter-American Commission on Human Rights, titled "Mario Gómez Yardez v. Argentina," comprising Drs. Susana Albanese, Aida Kemelmajer de Carlucci, and José L. Sabatini, appearing on pp. 36/42 of case file No. 932-S-2007-00100 from the Interior Ministry, titled Under Secretariat for Justice, REF/Case No. 11796, "YARDEZ MARIO GOMEZ," and of which a certified copy is attached to this decree as an integral part thereof.

Article 2: Authorize the payment of a total amount of ONE HUNDRED AND TEN THOUSAND PESOS (\$110,000), comprising:

- a) Compensation in the amount of SEVENTY THOUSAND PESOS (\$70,000), on behalf of the children Natalia Carolina Gómez Álvarez and Tamara Andrea Fernández, in their capacity as sole and universal heirs of Mr. Mario Gómez Yardez, of 50% (fifty percent) for each one. Said amount shall be deposited at the order of the corresponding Family Judge;
- b) The amount of TEN THOUSAND PESOS (\$10,000), to cover the costs arising from the domestic and international proceedings;
- c) The amount of THIRTY THOUSAND PESOS (\$30,000) to cover the professional fees of the attorneys Carlos Varela Álvarez and Diego Jorge Lavado;

Article 3: Request the National State, that in compliance with the express mandate set out in Articles 99.11 and 126 of the National Constitution and according to the provisions of Article 28 of the American Convention on Human Rights, to convey this Agreement to the Inter-American Commission on Human Rights for the purposes of its approval by the report established in Article 49 of the aforesaid Convention.

Article 4: Determine that the payment of the sums of money indicated in Article 2 of this decree shall be made, once the assent of the Legislature has been obtained, by the issuance of the corresponding administrative deed in compliance with applicable law.

Article 5: This decree is issued ad referendum of the Legislature.

Article 6: For communication, publication, entry into the Official Register, and archive.

23. On June 22, 2007, Law 7.710 was enacted, whereby the legislature of the province of Mendoza gave its assent to the agreement set out in Decree 1107 of 2007.

V. DETERMINATION OF COMPATIBILITY AND COMPLIANCE

24. The IACHR again notes that pursuant to Articles 48.1.f and 49 of the Convention, the aim of this procedure is "reaching a friendly settlement of the matter on the basis of respect for the human rights recognized in this Convention." Accepting this procedure demonstrates the State's good faith in pursuit of the Convention's purposes and goals under the principle of *pacta sunt servanda*. It would also like to reaffirm that the friendly settlement procedure provided for in the Convention allows individual cases to be concluded in a noncontentious fashion and that in cases from several different countries, it has provided an important and effective vehicle for resolving disputes that is available to either party.

25. The Inter-American Commission has closely followed the development of the friendly settlement reached in this case. The Commission greatly appreciates the efforts of the parties in reaching this settlement and declares that it is compatible with the purpose and goals of the Convention.

VI. CONCLUSIONS

26. Based on the foregoing considerations and in accordance with the procedure provided for by articles 48(1)(f) and 49 of the American Convention, the Commission wishes to reiterate its deep appreciation for the efforts made by the parties and its satisfaction for the achievement of a friendly settlement agreement in the instant case, based on the purpose of the American Convention.

27. Based on the foregoing considerations and conclusions outlined in this report,,

THE INTER-AMERICAN COMMISSION ON HUMAN RIGHTS

DECIDES:

1. To approve the terms of the friendly settlement agreement signed by the parties on December 5, 2006.

2. To continue to follow-up and monitor of each and every point of this friendly settlement and to remind the parties of their commitment to inform the IACHR regarding compliance with this friendly settlement.

3. To publish this report and include it in its annual report to the OAS General Assembly.

Done and signed in the city of Washington, D.C., on November 16, 2010. (Signed): Felipe González, President; Paulo Sérgio Pinheiro, First Vice-President; Dinah Shelton, Second Vice-President; María Silvia Guillén, Rodrigo Escobar Gil, and José de Jesús Orozco Henríquez, members of the Commission.